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Constitutional Law—Corporations—Doing Business

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RECENT DECISIONS

CONSTITUTIONAL LAW—CORPORATIONS—DOING BUSINESS.—Plaintiff, a California partnership, brought suit against the defendant, a foreign corporation engaged in the manufacture of beer, for breach of an oral contract making plaintiff a sales representative in California. Notice of the action was given by service on the California Secretary of State as provided by statute where foreign corporations doing business in the state have appointed no other process agent. Defendant removed the action to the federal district court where the summons was quashed on defendant's motion. On appeal by plaintiff to the Court of Appeals for the Ninth Circuit, *held,* affirmed. Defendant was not doing business in California within the meaning of the statute[1] and was therefore not subject to service of process in that state. *LeVecke v. Griesedieck Western Brewing Company,* 233 F.2d 722 (9th Cir. 1956).

At common law, jurisdiction could not be obtained over a foreign corporation in an action in personam, unless the corporation voluntarily submitted to service, because a corporation was not considered to have legal existence outside the borders of the state which created it.[2] This view is illustrated by *Pennoyer v. Neff,*[3] which established that personal service and voluntary appearance were the only means of obtaining personal jurisdiction over a non-resident defendant.

It was later recognized that, although corporations were to be considered persons for the purposes of suit, they differed fundamentally from individuals. Personal service upon an agent of a corporation, while acting in his capacity as agent, was recognized as valid personal service since corporations, unlike individuals, can act only through their agents.[4] The same case declared that a state might lawfully impose conditions upon a corporation doing business within its borders, one of which could be to require the appointment of a "process agent." The authorization of an agent to receive process might be implied as well as express.

Shortly after the turn of the century the federal courts developed a theory of "constructive presence" whereby corporations were considered present in a state upon the performance of transactions by their agents so as to be subject to in personam jurisdiction. In *International Harvester Company v. Kentucky*[5] the United States Supreme Court considered the quantity of transactions necessary to hold a corporation "doing business" and therefore present in the state. The corporation in that case had engaged in soliciting business and collection of accounts by check or draft, and had shipped machinery into the state over an extended period. In holding the corporation subject to service of process the Court stated that it required something more than mere solicitation to make a corporation present.[6]

[1]CAL. CORP. CODE ANN. § 6203 (Deering Supp. 1952) : " 'Transact intrastate business' means entering into repeated and successive transactions of its business in this State other than interstate or foreign commerce."
[2]See St. Clair v. Cox, 106 U.S. 350 (1882) ; Bank of Augusta v. Earle, 38 U.S. (13 Peters) 517 (1839) ; Annot., 94 L. Ed. 1167 (1950).
[3]95 U.S. 714 (1877).
[4]St. Clair v. Cox, 106 U.S. 350 (1882).
[5]234 U.S. 579 (1914).
[6]The Court distinguished Green v. Chicago, Burlington and Quincy Ry., 205 U.S. 530 (1907), which dealt with solicitation of ticket sales alone.

The doctrine of *Pennoyer v. Neff* was extended to permit in personam suits against foreign corporations by the use of theories of "implied consent" and "constructive presence." The application of these theories continued unopposed until 1945 when the United States Supreme Court handed down the decision in *International Shoe Company v. Washington,*[7] which by way of dictum suggested a more realistic approach to the problem and discarded the legal fictions which are the bases of the former theories. The Court said:

> But now that the *capias ad respondendum* has given way to personal service of summons or other forms of notice, due process requires only that in order to subject a defendant to judgment *in personam,* if he be not present in the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." . . . For the terms "present" and "presence" are used merely to symbolize those activities . . . sufficient to satisfy the demands of due process. Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system . . . to require the corporation to defend the particular suit which is brought there.

The Court then commented that it is enough that the corporation has established such contacts with the state that the particular form of substituted service adopted there gives reasonable assurance that the notice will be actual. Relying on *Hess v. Palowski*[8] the Court went on to say that the mailing of notice of suit to the defendant by registered mail at its home office was reasonably calculated to apprise it of suit.

In the instant case, the court construed the local statute setting forth the requirements of "doing business,"[9] but was influenced in its construction of the statute by doubts as to whether a contrary holding would satisfy due process. The appellants urged the consideration of several elements which they hoped would lead the court to decide that jurisdiction could be lawfully exercised over the Griesedieck Company. These factual elements consisted of annual promotional visits to California by Griesedieck's president, provision of advertising materials without cost to the LeVecke partnership, retention of control over retail prices, commissions paid for new accounts, and vesting in LeVecke of authority to settle disputes between the purchasers and the appellee. Appellants also cited the trend toward construing very liberally the activities within the state sufficient to subject foreign corporations to suit. Among California decisions cited as supporting this trend the most recent was *Fielding v. Superior Court,*[10] which rejected strict adherence to the requirements of "doing business" set out in the California statute.

The court of appeals in the instant case, after considering the cases relied on by the appellants, quoted an earlier California decision[11] for the scope

[7]326 U.S. 310 (1945).
[8]274 U.S. 352 (1927) (statute authorizing service by registered mail on out-of-state motorists).
[9]CAL. CORP. CODE ANN. § 6203 (Deering Supp. 1952).
[10]111 Cal. App. 2d 490, 244 P.2d 968 (1952).
[11]West Publishing Co. v. Superior Court, 20 Cal. App. 2d 726, 128 P.2d 780 (1942).

of the requirement in California and also as support for a position that "each case must be decided on its own facts." The court then noted that each of the cases cited by appellants contained elements which were not present in the instant case. In the *Fielding* case the corporation retained title to goods until they were sold by the distributor, whereas here all goods were sold at the appellee's place of business in Missouri. However, the court also relied on two recent California decisions[12] in support of the view that mere substantial sales by an out-of-state manufacturer to a local distributor do not constitute transacting "intrastate business" within the meaning of the California Corporations Code, yet in each of these cases there are important factors lacking which are present in the instant case. For example, in one case[13] the manufacturer did not control the retail prices, did no local advertising and did not give its representatives the power to settle claims and disputes in its name, elements which are all present here. In the other case[14] the corporation did in fact supply local advertising to distributors, and a vigorous dissent citing the trend of *International Shoe Company v. Washington* and *Fielding v. Superior Court* attacked the failure of the majority to take notice of this fact. The dissenter expressed the view that such additional activity would subject the corporation to process. He also called attention to the rejection by the *Fielding* case of the statutory definition of "doing business."[15]

By adherence to a stricter interpretation of the California Corporations Code the federal court of appeals in the instant case has ignored the broader rule adopted in California by *Fielding v. Superior Court*. Oddly enough, the court claims that the scope of the law in California is stated by *West Publishing Company v. Superior Court*[16] as follows:

> [T]he business must be of such nature and character as to warrant the inference that a corporation has subjected itself to local jurisdiction, and is by its duly authorized officer and agents present within the state where service is attempted.

This same statement is relied upon in *Sales Affiliates v. Superior Court*,[17] a case following the broader federal rule, as proof that California parallels the federal courts in decisions of this kind.

For its federal support the court in the instant case reaches back to 1926 and *Cudahy Packing Company v. Cannon Mfg. Company*,[18] in which the appellant had brought an action against a subsidiary corporation and the court ruled that the subsidiary was a separate entity, although admittedly the capital stock belonged to the defendant, and therefore not an agent so as to render defendant liable to service of process.

The conclusion of the instant case is best summed up in the words of its opinion, that the result was reached "in spite of and notwithstanding

[12]Estwing Mfg. Co. v. Superior Court, 128 Cal. App. 2d 259, 275 P.2d 146 (1955); Martin Bros. Electric Co. v. Superior Court, 121 Cal. App. 2d 790, 264 P.2d 183 (1954). See 23 AM. JUR., *Foreign Corporations* § 376 (1939).
[13]Martin Bros. Electric Co. v. Superior Court, 121 Cal. App. 2d 790, 264 P.2d 183 (1954).
[14]Estwing Mfg. Co. v. Superior Court, 128 Cal. App. 2d 259, 275 P.2d 146 (1955).
[15]CAL. CORP. CODE ANN. §§ 6200-6203 (Deering Supp. 1952).
[16]West Publishing Co. v. Superior Court, 20 Cal. App. 2d 726, 128 P.2d 780 (1942).
[17]96 Cal. App. 2d 134, 214 P.2d 541 (1950).
[18]267 U.S. 333 (1924).

the re-examination of the requisites of due process [as found in *International Shoe Company v. Washington*]."[19]

Case law in Montana is still at the stage prior to the *International Shoe* case.[20] If the rather orthodox decision in *LeVecke v. Griesedieck Western Brewing Company* is used as persuasive authority in the Montana courts, adoption of the progressive and preferable "minimum contacts" test will be unfortunately postponed.

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CRIMINAL LAW—INVOLUNTARY MANSLAUGHTER—UNLAWFUL ACT AS BASIS FOR CONVICTION.—Appellant, while driving on the wrong side of the highway, collided with an oncoming gasoline truck and caused the death of the driver. She was convicted of involuntary manslaughter based upon both criminal negligence in driving while under the influence of intoxicating liquor and upon the unlawful act of driving to the left of the center line.[1] On appeal to the Montana Supreme Court, *held,* reversed and remanded for a new trial. An instruction authorizing a manslaughter conviction for the unlawful act of driving on the wrong side of the road is erroneous because criminal negligence is an essential element of the crime of involuntary manslaughter. *State v. Strobel,* 304 P.2d 606 (Mont. 1956) (Chief Justice Adair and Justice Bottomley dissenting).

Bracton's thirteenth century writings stated that criminal liability attached for homicide committed by misadventure in the course of an unlawful act.[2] Coke recognized that homicide in the course of an unlawful act was necessarily either voluntary or involuntary, but stated both were punishable alike as murder.[3] Hale subsequently recognized a definite distinction between voluntary and involuntary manslaughter, and in his time

[19]Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952) ; Traveler's Health Ass'n v. Virginia, 339 U.S. 643 (1950).

[20]Montana case law is also limited to a few decisions on the subject. The theories of "implied consent" and "constructive presence" appear in the companion cases State *ex rel.* Am. Laundry Machinery Co. v. District Court, 98 Mont. 278, 41 P.2d 26 (1934), *cert. denied,* 295 U.S. 744 (1935), and State *ex rel.* Taylor Laundry Co. v. District Court, 102 Mont. 274, 75 P.2d 772 (1936). In the first case summons was quashed where it appeared that the corporation's dealings were limited to several isolated transactions. The corporation also was not shown to have appointed an agent for the purpose of service of process. The second case was tried on findings of new facts that the corporation had actually been engaged in continuous activity. The sale of goods, replacement of worn out parts, and adjustments and repairs to machinery enabled the court to infer that it was "present." By the time of the second suit the corporation had a regular agent upon whom process could be served in accord with R.C.M. 1921, § 9111(2).

The most recent Montana decision is State *ex rel.* Schmidt v. District Court, 111 Mont. 16, 105 P.2d 611 (1940). The corporation involved there had previously complied with the statutory requirement for appointment of an agent upon whom process could be served but failed to appoint a replacement when the original man died. This case adhered to the theory of "implied consent" and certainly did not require a broad rule in view of the corporation's long business contact with the state.

The most recent decision involving a Montana party and a foreign corporation is Clapper Motor Co. v. Robinson Motor Co., 119 F. Supp. 79 (D. Mont. 1954). The court there relied on the older theory of "constructive presence."

[1]REVISED CODES OF MONTANA, 1947, §§ 31-108 (19), 32-1102, and 32-1104, statutes then in force.

[2]BRACTON, DE LEGIBUS, 120b, 136b (1569) (written 1250's).

[3]COKE, 3d INSTITUTE No. 56 (1641).